

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
April 28, 1999

In the Matter of	:	
	:	
Kensington Crossing	:	
Homeowners Association, Inc.	:	
	:	Case No. 426-G
Complainant,	:	
	:	
vs.	:	
	:	
Eric Case	:	
	:	
Respondent.	:	

Decision and Order

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on April 28, 1999, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

On August 25, 1998, Kensington Crossing Homeowners Association, Inc. (hereinafter the "Complainant" or "Association") filed a formal dispute with the Office of Common Ownership Communities against Eric Case (hereinafter the "Respondent"). The Complainant alleged that the Respondent built a deck on his lot without written approval by the Association. The Respondent contended that his deck was approved by the developer-controlled Board of Directors and that no plans had been requested by the developer-controlled Board. The Complainant asked the Commission to order the Respondent to reduce his deck size so that it would comply with Association standards.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities and the Commission voted that it was a matter within the Commission's jurisdiction and the hearing date was scheduled.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Eric Case is the owner of a townhouse within the Kensington Crossing Homeowners Association, Inc., ("Association") located at 3316 Mills Crossing Place, Kensington, Maryland 20895 ("Lot").

2. The Association was created by an Articles of Incorporation and Declaration of Covenants, Conditions and Restrictions ("Declaration") which was recorded among the land records of Montgomery County, Maryland and which encumber and bind the Respondent's Lot and nineteen other lots and common parcels.
3. Article 6, Section 6.1 of the Declaration states, *inter alia*, the following:

No building, fence, wall, mailbox or other structure shall be commenced, erected or maintained upon the Property, nor shall any exterior addition to or change or alteration therein be made...until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing...by the Board of Directors of the Association, or by a covenant committee composed of three (3) or more members appointed by the Board...
4. The Respondent testified that he did not receive written approval from the Association pursuant to Article 6 but testified that he approached Richard Cantor, the then President of the Association under developer-control, on May 18, 1998 and that Richard Cantor orally approved his deck.
5. In support of his claim that Richard Cantor approved his deck on May 18, 1998, Respondent submitted a letter, dated July 7, 1998, from Dan Richards. Richards was the developer's site supervisor for Kensington Crossing and claimed in said letter that he was present at the May 18, 1998 meeting and that Richard Cantor did approve the Respondent's deck.
6. However, at the hearing Dan Richards testified that Richard Cantor did not give the Respondent approval for the deck on May 18, 1998 but that Richard Cantor indicated that Respondent should submit his plans to him (Richard Cantor) for approval by the Board. Richards further testified that the Respondent was not requesting approval at the May 18, 1998 meeting but was attempting to confirm to whom he needed to submit plans for approval.
7. Richard Cantor testified that he never gave oral approval for the construction of decks and did not give the Respondent approval for the deck May 18, 1998 but informed the Respondent that he (Cantor) was the person to whom to submit plans and that he never received such plans.
8. Amy Cantor, Richard Cantor's wife, and Board member during the period of developer control, testified that to the best of her knowledge she initialed all plans for decks which were brought to her attention and that the Board did not

knowingly allow any decks (including Respondent's) to be erected without initialing the plans and/or building permits.

9. Respondent alleged that there were other incidents where decks and other improvements were orally approved by the developer-controlled Board however Respondent did not present sufficient evidence to refute Amy Cantor's testimony concerning her practice of initialing building plans to evidence Board approval.
10. Shortly after noticing post installation for the deck, the Association, by letter dated June 9, 1998, notified the Respondent that if he was intending to add a deck or other structure to his home that Association approval was required pursuant to Article 6.
11. Sometime between June 9, 1998 and June 15, 1998, Respondent submitted plans for his deck to Adam Rosenbaum, sole member of an Architectural Committee (appointed by the Board pursuant to Article 10 of the Bylaws) who reviewed and recommended, on June 16, 1998, that the Board deny the application due to the size of the deck.
12. By letter dated July 2, 1998, the Association informed the Respondent that the "Architectural Committee" had denied his plans due to size concerns and suggested that he resubmit plans.
13. Phil Becker, President of the Association and author of the July 2, 1998 letter referenced above, testified that the Board had never established a functioning Covenant Committee as provided for by Article 6 of the Declaration. Becker testified that the reference in the July 2, 1998 letter that the Architectural Committee denied the application was a misstatement and that Adam Rosenbaum was appointed Architectural Committee solely to make recommendations to the Board of Directors of the Association who retained sole discretion to approve or deny applications submitted under Article 6 of the Declaration.
14. By letter dated July 14, 1998 and corroborated by her testimony before the Commission at the hearing, Amy Cantor affirmed that no application or plans had ever been received for a deck from the Respondent by the developer-controlled Board.
15. The Respondent finished his deck sometime during the summer of 1998.

Conclusions of Law

The Board of Directors of the Association has the express authority in Article 6 of the Association's Declaration to approve any exterior additions, changes or alterations upon the Property prior to commencement.

The evidence supports the Association's position that Respondent never received approval for his deck, either from the developer-controlled Board or the owner-controlled Board, before or after constructing the same.

The Association's decision to deny the application was not arbitrary or capricious and reasonably related to size concerns set forth by the Association. There was insufficient evidence presented by Respondent to show that other decks were orally approved or that the size guidelines of 288 square feet were unreasonable (especially in light of the general discretion given to the Association under Article 6 of the Declaration) or to otherwise refute the Association's contention that the deck was not in harmony with the other decks within the Association.

While the Association's July 2, 1998 denial letter incorrectly summarized who actually denied the plans, it was clear to the panel that the Board of Directors was the entity that exercised the approval authority under Article 6 of the Declaration. This was supported by the testimony of Mr. Rosenbaum who indicated that he merely submitted recommendations to the Board in his capacity as the Architectural Committee (which the Board appointed pursuant to Article 10 of the Bylaws).

No evidence was presented by either party as to the legal fees or costs incurred and therefore no award legal fees or costs shall be awarded.

Order

In view of the foregoing, and based on the evidence of record, it is, on this 30th day of July, 1999, hereby Ordered by the Commission Panel that:

1. The Respondent must submit plans to the Association, within 30 days of the date of this Order, to reduce the size of the deck so that it complies with the 288 square foot guidelines.
2. The Association is compelled to review and respond to such plans within fifteen days of the date of receipt of such plans. If such plans are approved, Respondent will modify his deck accordingly within 30 days of the date of the Association's approval.
3. If the revised plans are not approved, Respondent shall promptly re-submit additional plans within 15 days of the date of the Association's decision. If the Respondent fails to submit additional plans (either under paragraph 1 or in response to an initial rejection of plans) he

shall remove his deck and restore any disturbed areas to their natural condition within 30 days of written demand from the Association.

The foregoing was concurred in by panel members Philbin, Wilson and Murphy.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court Of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Chapter 1100, Subtitle B, Maryland Rules of Procedure.



Peter S. Philbin, Panel Chair
Commission on Common
Ownership Communities

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